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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

RICHARD OLON and JENNIFER OLON,
a k a MARY JENNIFER OLON,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF CORRECTIONS and
COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF GENERAL SERVICES,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a state court, consistent with the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment, decide a case in a manner that arbitrarily and irrationally singles out the parties to that case for disparate treatment from other litigants similarly situated?

PARTIES TO THE PROCEEDINGS

Petitioners and plaintiffs below are Richard and Jennifer Olon, residents of the Borough of Cambridge Springs in Crawford County, Pennsylvania. Respondents and defendants below are the Commonwealth of Pennsylvania and two of its agencies, the Department of General Services and the Department of Corrections.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Richard and Jennifer Olon respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the Pennsylvania Supreme Court entered in the above-entitled proceeding on June 1, 1993.

OPINIONS BELOW

The opinion of the Pennsylvania Supreme Court is reported at 626 A.2d 533 (Pa. 1993), and is reprinted in the appendix hereto ("App.") at App. A. The opinion and order of the Commonwealth Court of Pennsylvania (Craig, P.J.) is reported at 606 A.2d 1241 (Pa. Commw. 1992), and is reprinted at App. B.

JURISDICTION

Petitioners filed a petition for review in equity with the Commonwealth Court of Pennsylvania on July 24, 1991, seeking to enjoin respondents from establishing a medium-security prison facility in violation of local zoning laws. Jurisdiction was premised on the Commonwealth Court's original jurisdiction. Pa. Stat. Ann. tit. 42, § 761 (1981 & Supp. 1993). Respondents objected to the petition by filing a demurrer on August 23, 1991. The Commonwealth Court, in its opinion and order of April 3, 1992, overruled respondents' objections and directed them to answer the petition for review. App. B. On May 14, however, the Commonwealth Court amended its April 3 Order to certify the matter for interlocutory review to the Pennsylvania Supreme Court. Pennsylvania's highest court agreed to hear the appeal, and reversed the Commonwealth Court in an opinion issued on June 1, 1993. App. A. A timely application for reargument was filed on June 11, 1993, App. D, and denied by the Pennsylvania Supreme Court on July 8, 1993. App. C. Justice Souter, Circuit Justice for the Third Circuit, granted petitioners' application for an extension of time to petition for a writ of certiorari. App. G. Pursuant to Justice Souter's order, the petition is timely if filed by November 5, 1993. The jurisdiction of this Court to review the judgment below is invoked under 28 U.S.C. § 1257(3) (1988).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 3(1)(ii)(A) of the Capital Budget Project Itemization Act for 1990-91, 1990 Pa. Laws Act No. 1990-223, P.L. 1472 ("Act 223") and Section 7 of An

act * * * providing for Department of Corrections capital projects * * *, 1992 Pa. Legis. Serv. Act No. 1992-180 (Purdon) ("Act 180"), are both reproduced in pertinent part at App. F.

STATEMENT OF THE CASE

Petitioners Richard Olon and Jennifer Olon ("the Olons") are homeowners who live in a residential section of the Borough of Cambridge Springs ("the Borough") in Crawford County, Pennsylvania. This litigation stems from the Olons' efforts to prevent respondents from establishing a medium-security prison in the Olons' neighborhood in plain contravention of zoning regulations promulgated for both the Borough and neighboring Cambridge Township ("the Township").

On December 20, 1990, the Pennsylvania General Assembly enacted Act 223. App. F. The Act allocated over $8 million to convert the former Polish National Alliance College ("the College"), located partially in the Borough and partially in the Township, into an 800-bed, medium-security correctional institution. The Act states, in pertinent part:

Project	Allocation
* * * * *	* * * * *
(ii) State Correctional Institution—Crawford County	
(A) Acquisition and renovation of the former Polish National Alliance College for use as a State Correctional Institution	$8,876,000

Act 223 authorized the respondents Department of Corrections and Department of General Services ("the Agencies") to acquire the College property and convert it into a penal facility. The part of the Borough in which the College was located is zoned "R-1 residential;" the part of

the Township in which it was located is zoned "EE educational and institutional." Neither municipality's zoning ordinances permit the use of the College property, or any portion thereof, as a correctional institution.[1]

Instead of seeking from the municipalities a variance or exception from these zoning restrictions, the Agencies acted without regard for local land use regulations. On December 22, 1990, they purchased the property in question for approximately $2.5 million, and shortly thereafter began making preparations to convert it into a prison. (Despite local zoning regulations forbidding such a use, the College is now scheduled to serve as a medium-security prison capable of housing approximately 800 inmates.)

Left with no other option, the Olons, on July 24, 1991, brought an action in the Commonwealth Court of Pennsylvania to enjoin the state from converting the College into a prison. On August 23, the Agencies filed preliminary objections to the Olons' claim, by way of a demurrer, contending that Act 223 granted them the implicit power to supersede any and all local zoning and land use controls.

On April 3, 1992, the Commonwealth Court, in an opinion authored by President Judge David Craig, held, in accordance with binding Pennsylvania Supreme Court precedent, that Act 223 lacked the explicit legislative intent required to trump the municipalities' zoning laws. *Olon* v. *Commonwealth Dep't of Corrections*, App. B. The court stated that "an explicit legislative statement is required to negate local zoning powers. * * * There is nothing in the appropriations bill which states that the local land use regulations are pre-empted by the project or by the agencies charged with constructing and ad-

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[1] Meanwhile, there are numerous sites in the Borough and the Township at which placement of a prison would not violate local zoning regulations.

ministering prisons." *Id.* at 11a. Accordingly, the court overruled respondents' demurrer and ordered them to answer the Olons' petition for review. Roughly a month and a half later, on May 14, the Commonwealth Court amended its April 3 Order to include the statement required by Pennsylvania Rule of Appellate Procedure 1311 for an interlocutory appeal by permission and stayed all proceedings pending the outcome of the appeal. *See* Order of May 14, 1992. On September 8, 1992, the Pennsylvania Supreme Court agreed to hear respondents' appeal of the Commonwealth Court's interlocutory order.

The Olons' case hardly represented a journey into uncharted waters for Pennsylvania's Supreme Court. The tribunal confronted precisely the same questions raised by the zoning dispute in the instant case roughly eight years earlier when it decided the seminal case of *Department of General Services* v. *Ogontz Area Neighbors Association*, 483 A.2d 448 (Pa. 1984) ("*Ogontz*"). The result was an intelligible bright-line rule which required that clear language evidencing a legislative intent to overrule local zoning ordinances be present before legislation is construed to pre-empt zoning laws. The *Ogontz* court stated that municipal zoning powers would be superseded only if there existed "clear language showing the overriding intent." *Id.* at 454 (quoting *City of Pittsburgh* v. *Commonwealth*, 360 A.2d 607, 613 (Pa. 1976)). It further explained:

> We decline to infer a legislative intent that the Commonwealth agency has preemptive land use powers. Of course, should the legislature determine that one or more Commonwealth agencies or projects should be empowered to supersede local land use regulations, it need only pass legislation to that effect. [*Id.* at 455.]

In so holding, the *Ogontz* court expressly overruled a prior decision, *City of Pittsburgh*, "insofar as [it] st[ood] for the proposition that the grant of eminent domain

powers to a state agency may be taken as an indication of legislative intent that the state agency may override local zoning regulations." 483 A.2d at 454.

From the date *Ogontz* was decided until the Olons' case came before the state supreme Court, the Pennsylvania judiciary steadfastly insisted upon express legislative intent to override local zoning laws. In 1988, for example, the Commonwealth Court reaffirmed *Ogontz* in *City of Harrisburg* v. *Capitol Housing Corp.*, 543 A.2d 620 (Pa. Commw. Ct. 1988), *appeal denied*, 564 A.2d 917 (Pa. 1989), by rejecting a state agency's claim that it was entitled to override local zoning regulations by virtue of a state statute that authorized it to acquire particular property for agency use, but which lacked explicit language concerning supersession of local zoning laws. In fact, on May 26, 1993—just six days before it decided *Olon*—the Pennsylvania Supreme Court itself solidified the principles articulated in *Ogontz* in *County of Venango* v. *Borough of Sugarcreek Zoning Hearing Board*, 626 A.2d 489 (Pa. 1993) (*"Sugarcreek"*). App. E. In that case, the court determined that a statute authorizing county commissioners to acquire land for purposes of a jail or prison did not authorize the commissioners to act in contravention of local land use regulations.

But on June 1, 1993, without rational explanation, the Pennsylvania Supreme Court departed from *Ogontz* and its progeny when it reversed the Commonwealth Court and found against the Olons. In so doing, the court inferred from Act 223 a legislative intent to override local zoning ordinances in the absence of a clear expression of such intent—an inference that its own precedents precluded. But instead of recognizing that it had failed to follow a well-established line of legal precedent, or expressing its intention to overrule that precedent, the *Olon* court purported to follow *Ogontz*. In addition, it failed to distinguish, or for that matter even mention, *Sugar-*

creek, a virtually identical case which had been decided in a directly contrary fashion just six days earlier.

In an attempt to rationalize its decision, the *Olon* court held that the General Assembly's designation in Act 223 of a specific building (the College) for a specific purpose (a prison) sufficiently expressed its intent to override the Borough's and the Township's land use regulations. This ruling simply cannot be reconciled with the very same court's opinion in *Ogontz*, in which the court refused to infer an intent to override local zoning ordinances where, just as in *Olon*, a specific building (at the corner of Ogontz and Olney Avenues in Philadelphia) was designated for a specific purpose (a development center for handicapped persons). This fact was recognized by Justice Rolf Larsen in his dissenting opinion in *Olon*. "To accept the majority's decision would, in effect, overrule *Ogontz* and would allow the Commonwealth and the General Assembly to override local zoning merely by appropriating money for a specific purpose." App. 7a.

Not only is the *Olon* court's finding of sufficient legislative intent in Act 223 belied by its own precedent, it is also contradicted by the General Assembly's own eleventh-hour attempt to bring Act 223 into line with Pennsylvania law. The legislature all but conceded that Act 223 lacked the requisite expression of legislative intent to override local zoning laws when, during the pendency of respondents' appeal to the Pennsylvania Supreme Court, it passed a second statute, Act 180, App. F, explicitly announcing its intention (as it could have done, but failed to do, from the outset) that local zoning ordinances be overridden. This unconstitutional "clarifying" legislation,[2] passed almost exactly two years after Act 223 was enacted, provides in relevant part:

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[2] The Pennsylvania Supreme Court did not rely on Act 180 because it undoubtedly realized that the Act was infirm—under both the Pennsylvania and United States Constitutions—as an advisory or clarifying statute that attempted to create intent *ex post* and

> (b) Capital projects in the category of public improvement projects specifically itemized for the Department of Corrections in section 3(1) of the act of December 20, 1990 (P.L. 1472, No. 223), known as the "Capital Budget Project Itemization Act for 1990-91," are hereby authorized to be acquired, constructed or used by the Department of General Services, its successor or assigns, notwithstanding any provision of law providing for or regulating zoning or land use planning, or any zoning ordinance, land use ordinance, building code or other regulation adopted or enacted by a political subdivision under the authority of any statute, or under the authority of any home rule charter authorized and adopted under any statute or the Constitution of Pennsylvania. [Amending Section 2401.1a of the Act, added July 1, 1990 (P.L. 277, No. 67), Pa. Stat. Ann. tit. 71, § 631.1.]

This supplemental law, signed by Pennsylvania Governor Robert Casey on December 18, 1992, illustrated the legislature's knowledge of its obligation in respect to overriding local zoning laws, as well as its failure to satisfy that obligation in this case. The Pennsylvania Supreme Court, however, claimed to divine the General Assembly's intent to override the Borough's and Township's zoning ordinances from the general authorization language in Act 223, and reversed the Commonwealth Court. Not surprisingly, the court did not rely on or even mention Act 180.

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interfere with judicial independence by mandating a rule of decision. *See, e.g., United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 146-47 (1871) (When Congress, by enacting a post-hoc clarifying statute, "prescribe[s] a rule for the decision of a cause in a particular way," it "passe[s] the limit which separates the legislative from the judicial power," and the legislation must be declared unconstitutional); *Saint Joseph Lead Co.* v. *Township of Potter*, 157 A.2d 638, 642 (Pa. 1959) ("It is elementary that the legislature cannot create authority retroactively simply by passing 'clarifying' legislation. The intent of the legislature must be determined as of the time the original act was passed.").

Because there was no indication that the Pennsylvania Supreme Court would abandon its own precedent, the Olons' first opportunity to assert their constitutional claims was in an application for reargument filed, of course, after the *Olon* decision was announced. App. D. The present claims were thus raised in a timely fashion below. *See PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 85-86 n.9 (1989); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 677-678 (1930). The application was denied by the Pennsylvania Supreme Court on July 8, 1993. App. 14a.

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW, BY ARBITRARILY AND IRRATIONALLY DIVERGING IN THE OLONS' CASE FROM AN OTHERWISE UNBROKEN LINE OF PRECEDENTS, DEPRIVED THE OLONS OF THEIR CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION AND DUE PROCESS

The Pennsylvania Supreme Court, by reversing the decision of the Commonwealth Court and refusing to enjoin establishment of the medium-security prison, effectively reversed its own clear precedents which required an explicit legislative pronouncement to override local zoning regulations. Of course, a state supreme court is free to reverse its prior decisions in proper circumstances if proper procedures are followed. But when a court singles out a litigant for inconsistent treatment while simultaneously leaving intact its prior rule of decision, that litigant's constitutionally guaranteed rights to due process and equal protection under the law are infringed.

As an initial matter, this Court has repeatedly recognized that the actions of a state's judicial branch are subject to the strictures of the Fourteenth Amendment. In *Brinkerhoff-Faris*, the Court affirmed that "[t]he federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or

administrative branch of government." 281 U.S. at 680. *See also Ownbey* v. *Morgan*, 256 U.S. 94, 110-111 (1921) (due process clause restrains judicial, legislative and executive state action). Expanding on that principle, the Court, in holding that equal protection claims were also potentially cognizable in an action challenging a state's judicial determination, noted that "the examples of state judicial action which have been held by this Court to violate the [Fourteenth] Amendment's commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair." *Shelley* v. *Kraemer*, 334 U.S. 1, 17 (1948).

The Fourteenth Amendment violation in this case arises out of the Pennsylvania Supreme Court's unjustifiably unequal treatment of particular litigants, namely the Olons. While a state's highest court undoubtedly may render opinions which further develop an evolving judicial doctrine or, in some cases, even directly overrule its own precedents, it may not, consonant with the United States Constitution, arbitrarily ignore its own well-established legal doctrines.

The legal doctrine which the Pennsylvania Supreme Court misapplied in the Olons' case was first set forth in *Department of General Services* v. *Ogontz Area Neighbors Association*, *supra*. *Ogontz* involved a dispute, practically identical to the one before the Court in the case *sub judice*, between private citizens and the Pennsylvania Department of General Services ("the Agency") over whether a state agency, authorized by a legislative pronouncement to acquire and use property for a purpose forbidden by local zoning rules, could override those land use regulations in the absence of a clear expression of legislative intention to do so. Specifically in *Ogontz*, the Agency sought to use a particular site in Philadelphia [3]

[3] One specific proposed site was at issue in *Ogontz*: "The proposed site * * * adjoin[ing] Kemble Park at the corner of Ogontz and Olney Avenues in Philadelphia." 483 A.2d at 450.

for a particular purpose, namely the construction of a development center for mentally handicapped persons, which was forbidden by the zoning ordinances which governed use of the site in question.

The controversy in *Ogontz* began when Philadelphia zoning authorities denied the Agency's application for the permits required to build the center, on the ground that the neighborhood in which it was to be erected was zoned residential. The city's Zoning Board of Adjustment ("the Zoning Board") also denied the Agency's request for a zoning variance. The Agency sought review of the Zoning Board's decision in the Philadelphia Court of Common Pleas, which sided with the state, holding that its power of eminent domain immunized its agencies from local land use restrictions. The Zoning Board and the Ogontz Area Neighbors Association—a citizens' group which had opposed the state's request for a zoning variance—appealed to the Commonwealth Court of Pennsylvania which, by an equally divided panel, affirmed the Court of Common Pleas. The case was then appealed to the Pennsylvania Supreme Court.

Noting that "the precise circumstances under which a Commonwealth agency's land use determinations will prevail over the land use regulations of a local zoning board has never been formulated by this Court," 483 A.2d at 452, the Pennsylvania Supreme Court undertook in *Ogontz* to articulate a rule which could guide the adjudication of all similar subsequent conflicts between state land use authorizations and local zoning laws. It came up with a straightforward standard: general land use authorization statutes would not be permitted to supersede local zoning regulations unless they contained "clear language showing the overriding intent." *Id.* at 454, (quoting *City of Pittsburgh*, 360 A.2d at 613). Thus, the court held that Philadelphia's local zoning ordinances were not superseded by Pennsylvania's land use plan which, while designating certain specified sites for a par-

ticular use, failed to express clearly a legislative intent to override zoning laws.

In *City of Harrisburg, supra*,[4] the appellate court faced a conflict between, on the one hand, a land use restriction on an apartment building which limited its use to residential private housing and, on the other hand, a state statute authorizing the Pennsylvania Higher Education Assistance Agency to acquire that particular property which it had been using as its offices. Despite the legislature's clear authorization to the agency to acquire the property, the court held that local land use regulations were not overridden: "[A]bsent clear legislative intent and direction to the contrary, a Commonwealth agency is subject to munipal zoning restrictions." 543 A.2d at 622.

On May 26, 1993, just six days before deciding the Olons' case, the Pennsylvania Supreme Court decided *County of Venango* v. *Borough of Sugarcreek Zoning Hearing Board, supra*. In *Sugarcreek*, the County owned several hundred acres of land on which it wished to erect a jail. Such a use for property contravened the Borough of Sugarcreek's applicable zoning ordinance which designated the area "R-1 Suburban Residential" (just as the Borough property at issue in *Olon* is classified).

The legislation upon which the County asserted preeminent authority read, in part,

> The county commisisoners may purchase for not more than the fair market value, take by gift, devise or by the power of eminent domain, in accordance with the provisions of this act, such real property at the county seat or in such other places, as may be authorized by law, as they deem necessary for the purposes of a * * * county jail, prison, * * * or other county building * * *. [626 A.2d at 491 (quoting Pa. Stat. Ann. tit. 16, § 2305 (Supp. 1993)).]

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[4] The *City of Harrisburg* decision was cited as an example of proper application of the *Ogontz* rule by the Pennsylvania Supreme Court. *Olon*, App. 3a-4a.

In reversing the lower court's determination that the above-quoted statute (and other similar provisions) satisfied the *Ogontz* test for determining legislative intent, the Pennsylvania Supreme Court held, "These sections are no more specific with regard to the zoning issue than the provisions authorizing acquisitions by eminent domain that we stated in *Ogontz* do not in and of themselves indicate a legislative intent to pre-empt local regulation." 626 A.2d at 491. The court concluded that the prison could not be built because the local land use regulations prevailed. *Id.* at 492.[5]

On June 1, 1993, the Pennsylvania Supreme Court announced its decision in *Olon*. Despite the holdings in *Ogontz*, *City of Harrisburg*, and *Sugarcreek*, the court concluded that by simply authorizing "[a]cquisition and renovation of former Polish National Alliance College for use as a State Correctional Institution," Act 223 "clearly expressed an intent to override local zoning ordinances which prohibited such use of the property." App. 2a, 5a. Though the court couched this determination in terms of an application of the *Ogontz* rule, it was not.

Like the ineffective statutes in *Ogontz* and *City of Harrisburg*, Act 223 did no more than authorize the acquisition of certain land. This type of general authorization is clearly inadequate to supersede zoning laws, as the *Ogontz* court's explicit rejection of the notion "that the grant of eminent domain powers to a state agency may be taken as an indication of legislative intent to over-

[5] In *Ogontz*, *City of Harrisburg*, and *Sugarcreek*, the courts also balanced the consequences of their potential rulings by considering the availability of viable alternative sites for the proposed government buildings. *Ogontz*, 483 A.2d at 455; *City of Harrisburg*, 543 A.2d at 622; *Sugarcreek*, 626 A.2d at 491-492. Several alternative sites within the Borough and Township provide viable locations for a prison, and do not run afoul of existing zoning regulations. The Pennsylvania Supreme Court, however, failed to consider the existence of these alternatives in the Olons' case.

ride local zoning regulations," 483 A.2d at 454, makes clear. *Ogontz* and its progeny stand for a bright-line rule: the legislature must clearly express its intent to override local zoning and land use ordinances before the courts of Pennsylvania will require such a result.[6]

The *Olon* decision purports to distinguish Act 223 from the statutes involved in *Ogontz* and *City of Harrisburg* by asserting that the statute in *Olon* alone names a particular purpose for the land in question. But neither of those earlier cases, nor *Sugarcreek*, is distinguishable on any rational basis from *Olon*. On the contrary, the result is simply an arbitrary and irrational failure to apply precedent which served to deny the Olons the benefit of the laws of Pennsylvania. *Ogontz*, plainly and simply, held that "the city's zoning authority supersedes that of the Commonwealth agency to establish a mental health facility in a particular geographic location * * * absent more certain legislative direction." 483 A.2d at 455. The facts of the instant case fit that formulation as well as any imaginable. Similarly, the underlying statute in *City of Harrisburg* gave the agency renting office space throughout a particular building authority to "acquire and hold title" to that very same building. 543 A.2d at 621.

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[6] Zoning is a particularly localized sphere of government. Just as *Ogontz* required a clear expression of legislative intent to override local zoning regulations, this Court has required explicit statements of Congressional intent to justify the pre-emption of state law. For example, in determining that a federal statute governing the actions of the Administrator of Veterans' Affairs did not preclude a state court from ordering a veteran to pay child support with his veterans benefits, Justice Marshall, writing for the Court, stated: "Congress would surely have been more explicit had it intended the Administrator's apportionment power to displace a state court's power to enforce an order of child support." *Rose* v. *Rose*, 481 U.S. 619, 628 (1987). In a similar vein, the Court has ruled that "historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 206 (1983).

Unless the legislature intended the Pennsylvania Higher Education Assistance Agency to change its line of work, the specific property and the specific purpose could not have been more patent in that statute as well. Finally, in *Sugarcreek*, the Pennsylvania Supreme Court found that a statute authorizing county commissioners to locate a prison "at the county seat or elsewhere," despite its broad mandate arguably permitting construction on any land that the county could obtain, did not give the commissioners the authority to ignore local zoning and land use regulations. App. 23a.

The real thread that connects *Ogontz*, *City of Harrisburg*, and *Sugarcreek* is the requirement of an explicit legislative determination that local zoning ordinances should not defeat the actions permitted by the various statutes at issue therein. A legislature is presumed to know the law that will govern interpretation of its enactments, *see, e.g., Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation"); *Sunny Farms, Ltd.* v. *North Codorus Township*, 474 A.2d 56, 59 (Pa. Commw. Ct. 1984) (legislature presumed to know judicial construction of earlier statutes), and the Pennsylvania legislature has demonstrated its ability to make the required explicit statement of intent on numerous occasions.[7] It demonstrated its ability to do so in this case as well, albeit in an unconstitutionally tardy fashion, by enacting Act 180. The cases in the *Ogontz* line have upheld the authority of local zoning ordinances whenever the required indication of intent has been lacking with the notable and inadequately explained exception of *Olon*.

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[7] In addition to Act 180, *supra*, *see, e.g.*, Pa. Stat. Ann. tit. 55, § 697.21 (Supp. 1993) ("authority may * * * locate port facilities * * * notwithstanding any zoning ordinance or regulation") (enacted 1989); Pa. Stat. Ann. tit. 55, § 698.25 (Supp. 1993) ("To have and exercise the power of eminent domain * * * to locate port facilities * * * notwithstanding any zoning, land use planning or building code ordinance, code or regulation") (enacted 1992).

In *Binkerhoff-Faris*, this Court considered a Missouri Supreme Court decision that, like *Olon*, broke with established precedent. In determining that the petitioner had demonstrated a constitutional violation, Justice Brandeis, writing for the Court, recognized,

> Undoubtedly, the state court had the power to construe the statute * * * and to reexamine and overrule the [precedential] case. Neither of these matters raises a federal question; neither is subject to our review. But while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. [281 U.S. at 681-682 (footnote omitted).]

The Olons were denied this opportunity to vindicate their due process rights when the Pennsylvania Supreme Court ignored its own precedents in deciding the *Olon* case.

The Olons reasonably and justifiably expected that the Pennsylvania Supreme Court would follow the *Ogontz* line of cases and determine, as the rule of decision for that line of cases mandates, that Act 223 was inadequate to override local zoning regulations. Of course, if the court had overruled *Ogontz*, or even purported to expand or clarify its scope, or if the Olons' case were not preceded by *Ogontz*, *City of Harrisburg*, and *Sugarcreek*, that would be a different case. *E.g.*, *Binkerhoff-Faris*, 281 U.S. at 681 n.8 (a state court can ordinarily overrule prior decisions without violating due process). But instead, the Pennsylvania Supreme Court diverged from *Ogontz*, from *City of Harrisburg*, and even from *Sugarcreek*, which was decided just days earlier. In so doing, the court denied the Olons their right guaranteed by the Due Process Clause of the Fourteenth Amendment to have the Pennsylvania Supreme Court follow its time-honored procedure of applying established precedent or, at least,

articulating a reasoned justification for departing therefrom.[8]

The actions of the Pennsylvania Supreme Court are also violative of the Olons' constitutional right to equal protection: "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). *See also Plyler* v. *Doe*, 457 U.S. 202, 216 (1982); *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568, 587 (1979); *F.S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920). The Olons, obviously, recognize that "the Fourteenth Amendment does not in guaranteeing equal protection of the laws, assure uniformity of judicial decision * * *." *Milwaukee Elec. Ry. & Light Co.* v. *Wisconsin ex rel. Milwaukee*, 252 U.S. 100, 106 (1920). Otherwise, "every alleged misapplication of state law would constitute a federal constitutional question." *Beck* v. *Washington*, 369 U.S. 541, 555 (1962). But that rule does not vitiate this Court's recognition that "arbitrary and irrational discrimination violates the Equal Protection Clause under even our most deferential standard of review." *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 83 (1988). *See also Lindsey* v. *Normet*, 405 U.S. 56, 79 (1972).

The Olons assert that the decision reached in their case was arbitrary and irrational given established Pennsyl-

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[8] Recognizing that any other rule would engender arbitrary action, this Court has similarly required federal agencies to provide an acceptable justification for altering established agency rules. *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when the agency does not act in the first instance").

vania precedent. The Pennsylvania Supreme Court applied the *Ogontz* rule to essentially indistinguishable circumstances in *Sugarcreek*, decided just days before *Olon*. In *Sugarcreek*, the court concluded that the legislative body had failed to specify its intent to override local zoning ordinances, so those ordinances predominated. Then, in *Olon*, purportedly under the same rubric, the court reached the opposite result. Yet, after the *Olon* decision, the *Ogontz* rule inexplicably still stands. As Justice Black wrote in *Beck*, "If Beck has been denied * * * protection [of the law] without the law's having been changed, then he has been singled out by the State as the sole person to be so treated. Such a singling out would be a classic invidious discrimination and would amount to a denial of equal protection of the law." 369 U.S. at 563 (Black, J., dissenting). By the terms of the *Olon* opinion, the rule announced in *Ogontz* continues with its former vitality. Only the Olons and their town, through the joint actions of the General Assembly, the Governor, and the Pennsylvania Supreme Court, have been denied the benefit of *Ogontz*'s protection. That denial amounts to a violation of the Olons' rights under the Equal Protection Clause: "The Equal Protection Clause * * * keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger* v. *Hahn*, 112 S. Ct. 2326, 2331 (1992).

II. BECAUSE COURTS ARE CONSTANTLY CONFRONTED WITH FOURTEENTH AMENDMENT CLAIMS PREMISED ON THE ALLEGED FAILURE TO ADHERE TO JUDICIAL PRECEDENT, THE COURT SHOULD USE THIS CASE TO CLARIFY ITS JURISPRUDENCE IN THIS IMPORTANT AREA

The claims of litigants aggrieved by what they perceive to be unconstitutionally unequal application of judicial precedent by state courts permeate the judicial system. *See, e.g., Boyer* v. *State*, 562 A.2d 1186 (Del. 1989);

Spicuzza v. *Fonseca*, 537 So.2d 272 (La. App. 1988); *Tassian* v. *People*, 696 P.2d 825 (Colo. App. 1984), *rev'd*, 731 P.2d 672 (Colo. 1987); *Moyer* v. *State*, 452 A.2d 948 (Del. 1982); *State* v. *Rivens*, 261 S.E.2d 867 (N.C. 1980); *Dear* v. *Rathje*, 391 F. Supp. 1 (N.D. Ill. 1975), *aff'd*, 532 F.2d 756 (7th Cir. 1976); *Davis* v. *Behagen*, 321 F. Supp. 1216 (S.D.N.Y.), *aff'd sub nom. United States ex rel. Davis* v. *Behagen*, 436 F.2d 596 (2d Cir. 1970). The backdrop for these numerous and recurring claims is this Court's holding that a state's judicial branch can render decisions which are violative of the Fourteenth Amendment. *See Shelley* v. *Kraemer*, *supra*; *Brinkerhoff-Faris*, *supra*. However, this Court has never directly confronted the question whether a drastic and inadequately explained divergence from state court precedent, resulting in radically disparate treatment of similarly situated litigants, can rise to the level of a constitutional violation. Justice Black, in *Beck*, has given strong indications that it can. The Olons' case presents the Court with an opportunity to address this important and recurring issue.

Most courts, in considering claims analogous to that presented here by the Olons, simply hold that the Fourteenth Amendment does not guarantee uniformity in judicial decisionmaking. *E.g.*, *Boyer*, 562 A.2d at 1188; *Dear*, 391 F. Supp. at 9; *Behagen*, 321 F. Supp. at 1219. The Olons do not contest that fundamental proposition. But the Olons here complain of more than a mere lack of uniformity of decision; they contend that the Pennsylvania Supreme Court arbitrarily and irrationally singled them out for disparate treatment from other litigants similarly situated, producing a result that was at odds with controlling precedent and inconsistent with the result reached in an almost identical case just days earlier. By hearing this case, the Court will have the opportunity to clarify the circumstances under which such judicial action can violate the Fourteenth Amendment.

The Court has long recognized its obligation to protect citizens aggrieved by state judicial action violative of due process or equal protection standards: "[W]hen the effect of [state] action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands." *Shelley* v. *Kraemer*, 334 U.S. at 20. Petitioners request that the Court use the instant case to clarify its jurisprudence and hold that no state actor, including the judiciary, can arbitrarily and irrationally single out particular citizens for disparate treatment without running afoul of the United States Constitution.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision of the court below.

Respectfully submitted,

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November 1993

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 80 M.D. Appeal Docket 1992

RICHARD OLON and JENNIFER OLON, a/k/a
MARY JENNIFER OLON, his wife,
Appellees

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF CORRECTIONS and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF GENERAL SERVICES,
Appellants

Appeal from the Order of the Commonwealth Court dated May 14, 1992, at No. 215 M.D. 1991

147 Pa.Cmwlth. 22, 606 A.2d 1241 (1992)

ARGUED: May 4, 1993

OPINION OF THE COURT

MR. JUSTICE FLAHERTY DECIDED: JUNE 1, 1993

Neighboring landowners petitioned for review of actions by the state Department of Corrections to renovate a former college site for use as a state prison in violation of local zoning ordinances. The department demurred, alleging that an act of the legislature authorized the project. The Commonwealth Court held that the appropriations bill authorizing the project did not inferentially

negate local land use ordinances, and overruled the demurrer. In this interlocutory appeal by allowance, we hold that the legislature statutorily superseded the local zoning ordinance, and reverse the order of the Commonwealth Court.

On December 20, 1990, the General Assembly enacted the Capital Budget Project Itemization Act for 1990-91, Act 223 of 1990, effective immediately, which authorized the incurrence of $8,876,000 of debt for the "[a]cquisition and renovation of former Polish National Alliance College for use as a State Correctional Institution." On December 22, 1990, the Department of Corrections acquired the property for $2,500,000. The departments of corrections and general services undertook the renovation and conversion of the property to serve as a prison. The Crawford County facility is located partially in the Borough of Cambridge Springs, in a residential district, and partially in the Township of Cambridge, in an educational and institutional district. Neither municipality's zoning ordinance permits the property to be used as a correctional institution.

Neighboring property owners filed a petition for review in the Commonwealth Court in the nature of a complaint in equity, seeking a permanent injunction against the conversion and use of the former college as a prison, alleging that such use would violate the local zoning ordinances. The departments of corrections and general services filed preliminary objections in the nature of a demurrer, contending that by authorizing the purchase of the college site for conversion and use as a prison, the legislature overrode any local zoning and land use controls. The court overruled the preliminary objections and entered an order stating that the decision involved "a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal from this order may materially advance the ultimate termination of this matter," as prescribed in 42 Pa.C.S.

§ 702(b), and this court permitted the interlocutory appeal pursuant to Pa.R.A.P. 1311.

In reaching its decision, the Commonwealth Court discussed the holding of *Dep't of General Services v. Ogontz Area Neighbors Ass'n*, 505 Pa. 614, 483 A.2d 448 (1984), concluding that this court "refused to infer a legislative intent that the Commonwealth agency has preemptive land use powers, and thereby indicated that an explicit legislative statement is required to negate local zoning powers." *Olon v. Commonwealth, Dept. of Corrections*, 147 Pa.Cmwlth. 22, 25, 606 A.2d 1241, 1242-43 (1992). The Commonwealth Court found nothing in the legislation "which states that the local land use regulations are preempted by the project or by the agencies charged with constructing and administering prisons. *Ogontz* not only prohibits us from automatically conferring preemptive land use powers upon a Commonwealth agency but also rejects attributing preemptive land use powers by inference." *Id.* at 26, 606 A.2d at 1243.

Instead, the Commonwealth Court relied on *Harrisburg v. Capitol Housing Corp.*, 117 Pa.Cmwlth. 408, 543 A.2d 620 (1988). In that case, the Pennsylvania Higher Education Assistance Agency (PHEAA) had been granted legislative authority to "acquire and hold title in the name of the agency to the property known as the Towne House, including the Annex thereto leased by the agency . . . and to make such arrangements as may be necessary to finance such acquisitions." Act of August 7, 1963, P.L. 549, as amended, 24 P.S. § 5104(12), (Act 130). When PHEAA attempted to acquire and use the Towne House property in violation of the redevelopment plan governing the property, the Commonwealth Court prohibited such use, holding that "Act 130 did not grant PHEAA the power to supersede the local land use regulation" and that "without more, legislation authorizing a state agency project does not inferentially negate the local land use controls." *Olon v. Dep't of Corrections*, 147 Pa.Cmwlth. at 26, 606 A.2d at 1243.

The Commonwealth Court thus correctly understood *Ogontz* to require specific legislative intent to override municipal zoning powers before a Commonwealth agency will be deemed to possess preemptive land use powers; nevertheless, such an intent is evident in the legislation underlying this case. The *Capitol Housing Corp.* case relied on by the Commonwealth Court and the cases urged by appellees, e.g. *City of Pittsburgh v. Commonwealth*, 468 Pa. 174, 360 A.2d 607 (1976), do not, however, justify the result reached in the Commonwealth Court.

Ogontz involved legislation empowering the department of public welfare (DPW) to acquire property for the purpose of relocating 900 patients formerly housed at Pennhurst State School and Hospital, a mental health facility, and the department purchased twelve sites in Philadelphia. When the Commonwealth agency sought to construct a new facility at one of the sites, the city zoning authority denied permission due to the proposed facility's failure to comply with the local zoning ordinance. This court was presented with the question whether the Mental Health and Retardation Act of 1966, Act of October 20, 1966, Special Sess. No. 3, P.L. 96 *as amended*, 50 P.S. § 4101 *et seq.*, authorizing DPW to plan, supervise, operate, and acquire property for mental health and retardation facilities at various locations throughout the state, or Act 256 of 1970, allocating funds to DPW to develop a regional program to relocate patients from Pennhurst State School and Hospital, created in DPW authority to override local land use and zoning restrictions. We concluded that the general grant of authority to acquire land did not imply a legislative intent that the agency was given preemptive land use powers, and that the agency was subject to the jurisdiction of the zoning board with respect to local use restrictions. We stated, however: "Of course, should the legislature determine that one or more Commonwealth agencies or projects should be empowered to supersede local land use regulations, it need only pass legislation to

that effect." *Ogontz*, 505 Pa. at 628, 483 A.2d at 455. This we think the legislature did in this case.

This legislation is distinguishable from that in the cases discussed supra in this respect: here the General Assembly specified both the property to be acquired and the specific use of the property. None of the other cases involved this combination of factors: either they authorized an agency to acquire unspecified property for a specific purpose, e.g. *Ogontz, supra, City of Pittsburgh v. Commonwealth, supra*, or they authorized an agency to acquire specific property for an unspecified purpose, e.g. *Capitol Housing Corp., supra.* In authorizing the acquisition of the Polish National Alliance College property to be used specifically as a state correctional institution, the General Assembly clearly expressed an intent to override local zoning ordinances which prohibited such use of the property.

The order of the Commonwealth Court must therefore be reversed.

Ordered reversed.

Mr. Justice Larsen files a dissenting opinion.

JUDGMENT ENTERED:

JUNE 1, 1993

/s/ Shirley Bailey
Chief Clerk

DISSENTING OPINION

JUSTICE ROLF LARSEN

I dissent. The majority holds that because the General Assembly authorized the acquisition of the Polish National Alliance College property to be used specifically as a state correction institution in the Capital Budget Project Itemization Act for 1990-1991 ("Act 223"), the General Assemble clearly expressed an intent to override the local zoning ordinances. The only way the majority could reach its decision today is by inferring legislative intent. In *Commonwealth of Pennsylvania, Department of General Services v. Ogontz Area Neighbors Association*, 505 Pa. 614, 628, 483 A.2d 448, 455 (1984), this court refused to infer a legislative intent that the Commonwealth agency has preemptive land use powers.

I think the Commonwealth Court correctly held that the clear legislative intent necessary to preempt or override the local zoning ordinances of the Borough of Cambridge Springs and the Township of Cambridge cannot be found in Act 223. Section 3(1)(ii) of Act 223 merely provides an appropriation and a general authorization to acquire the Alliance College and convert it to a prison. The granting of authority to purchase a specific parcel of property "does not clothe [an agency] with the power of eminent domain or the right to supersede local land use regulations". *City of Harrisburg v. Capital Housing Corporation*, 117 Pa. Commw. 408, 543 A.2d 620 (1988).

In *Ogantz, supra*, a majority of this court stated:

> Of, course, should the legislature determine that one or more Commonwealth agencies or projects should be empowered to supersede local land use regulations, it need only pass legislation to that effect.

Id. at 628, 483 A.2d at 455. In his concurring opinion, Justice Zappala noted:

> Through the zoning enabling acts, the Legislature has granted municipalities the power to carefully plan and supervise the comprehensive development of their land. Yet this *specific* grant of power would be highly illusory, and its purpose thwarted, if another public entity were able to override it by implication. I would hold simply that absent a specific legislative grant of authority exempting an agency from local zoning regulations, the local regulations must control.

Ogontz, 505 Pa. Commw. at 629, 483 A.2d at 456 (Zappala, J., concurring, Larsen and McDermott, JJ., joining) (emphasis in original).

If the legislature intended to nullify or negate any local zoning or any other land use controls, they easily could have provided for such intent by including *specific* language relating to that subject matter in Act 223. There is nothing in the Act which states that the local land use regulations are preempted by the project or by the agencies charged with constructing and administering prisons.

Merely providing for an appropriation to purchase a location for use as a state institution or facility does not provide a *specific* legislative intent to nullify local zoning regulations and ordinances. To accept the majority's decision would, in effect, overrule *Ogontz* and would allow the Commonwealth and the General Assembly to override local zoning merely by appropriating money for a specific purpose. This clearly is not what this Court intended in *Ogontz;* nor has the legislature seen fit to "overrule" *Ogontz.*

Therefore, I would affirm the decision of the Commonwealth Court.

APPENDIX B

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 215 M.D. 1991

RICHARD OLON and JENNIFER OLON, a/k/a
MARY JENNIFER OLON, his wife,
Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF CORRECTIONS and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF GENERAL SERVICES,
Respondents

Argued: November 21, 1991

Before: HONORABLE DAVID W. CRAIG, President Judge
HONORABLE JAMES GARDNER COLINS, Judge (P.)
HONORABLE SILVESTRI SILVESTRI, Senior Judge

OPINION BY PRESIDENT JUDGE CRAIG

Filed: April 3, 1992

Before this court are the preliminary objections in the nature of a demurrer of the Pennsylvania Department of Corrections and the Pennsylvania Department of General Services (departments) to the petition of Richard and Jennifer Olon (landowners) for review of the departments' plans to build a prison in the Borough of Cambridge

Springs and Cambridge Township, Crawford County, Pennsylvania. We overrule the objections.

The issue in this case is whether an appropriations bill naming a former college site and authorizing its acquisition and renovation for use as a state prison gives the departments the right to supersede the local land use regulations of the borough and the township.

The facts in this case are as follows. On December 20, 1990, the General Assembly enacted Act 223, entitled the Capital Budget Project Itemization Act for 1990-1991.[1] This Act allocated funds for the conversion of a former college into a prison. Act 223 states, in relevant part:

Project	Allocation
. . . .	
(ii) State Correctional Institution-Crawford County	
(A) Acquisition and renovation of former Polish National Alliance College for use as a State Correctional Institution	8,876,000

The college is located in both the Borough of Cambridge Springs and Cambridge Township. The college is located in a residential district in the Borough of Cambridge Springs and in an educational and institutional district in Cambridge Township; thus, neither of these municipalities' zoning ordinances permit the use of the land for a prison.

The landowners' petition in this court's original jurisdiction, 42 Pa. C.S. § 761, seeks to enjoin the departments from converting the college into a prison. The departments filed preliminary objections in the nature of a demurrer to the petition for review, stating that Act 223

[1] Supplement to the Act of July 9, 1990, P.L. 350, No. 80, *as amended.*

grants to the departments the power to preempt local zoning ordinances for this project.

Initially, we note that preliminary objections in the nature of a demurrer will be sustained only where a complaint is clearly insufficient to establish a right to relief, and any doubt must be resolved in favor of overruling that demurrer. *County of Allegheny v. Commonwealth of Pennsylvania,* 507 Pa. 360, 490 A.2d 402 (1985).

The leading case on the issue stated above is *Department of General Services v. Ogontz Area Neighbors Association,* 505 Pa. 614, 483 A.2d 448 (1984).

In *Ogontz,* the Department of General Services attempted to construct a two-story building in Philadelphia which would have served as a development center for mentally handicapped persons. After the department applied for a building permit, the Philadelphia Department of Licenses and Inspections denied the requested use, stating that the proposed use was an impermissible use in the district.

The department appealed to the Zoning Board which affirmed the licensing department's decision. The department then appealed to the common pleas court which reversed the zoning board, stating that because the legislature granted to the department the power to condemn property for establishing mental health facilities, the department was immune from local land use restrictions. This court affirmed that decision, and a group of landowners appealed to our Supreme Court.

The Supreme Court reversed this court, stating that without clear legislative intent to the contrary, a state agency does not enjoy immunity from local zoning regulations. The Supreme Court overruled a previous decision which had stated that the grant of eminent domain powers to a state agency may be taken as an indication of legislative intent that the agency may supersede local zoning regulations. The Supreme Court's majority opinion stated:

> Of course, should the legislature determine that one or more Commonwealth agencies or projects should be empowered to supersede local land use regulations, it need only pass legislation to that effect.

Ogontz, 505 Pa. at 628, 483 A.2d at 455.

The Supreme Court thus rejected a balancing approach, refused to infer a legislative intent that the Commonwealth agency has preemptive land use powers, and thereby indicated that an explicit legislative statement is required to negate local zoning powers.

Here the legislation relating to the proposed conversion of Alliance College into a prison facility is set forth in an appropriations bill. There is nothing in the appropriations bill which states that the local land use regulations are preempted by the project or by the agencies charged with constructing and administering prisons. *Ogontz* not only prohibits us from automatically conferring preemptive land use powers upon a Commonwealth agency but also rejects attributing preemptive land use powers by inference.

In *Harrisburg v. Capitol Housing Corp.*, 117 Pa. Commonwealth Ct. 408, 543 A.2d 620 (1988), the Pennsylvania Higher Education Assistance Agency (PHEAA) attempted to purchase property owned by Capitol Housing Corporation (CHC). CHC bought the property from the City of Harrisburg and the deed incorporated a redevelopment plan dividing the area into residential, institutional and commercial tracts. PHEAA's attempted use of the property contradicted the redevelopment plan. PHEAA attempted to purchase the property pursuant to Act 130,[2] which stated that PHEAA had the right to:

> [A]cquire and hold title in the name of the agency to the property known as the Towne House, including the Annex thereto leased by the agency . . . and

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[2] Act of August 7, 1963, P.L. 549, *as amended*, 24 P.S. § 5104 (12).

to make such arrangements as may be necessary to finance such acquisitions.

Capitol Housing Corp., 117 Pa Commonwealth Ct. at 412, 543 A.2d at 621.

This court concluded in *Capitol Housing Corp.* that Act 130 did not grant to PHEAA the power to supersede the local land use regulation. The language of Act 130 in that case was similar to that of Act 223 here, and therefore the *Capitol Housing Corp.* case confirms the view that, without more, legislation authorizing a state agency project does not inferentially negate the local land use controls.

Accordingly, the preliminary objections of the departments are overruled, and the departments are directed to answer the petition for review.

/s/ David W. Craig
DAVID W. CRAIG
President Judge

Judge Colins dissents.

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 215 M.D. 1991

RICHARD OLON and JENNIFER OLON, a/k/a
MARY JENNIFER OLON, his wife,
Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF CORRECTIONS and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF GENERAL SERVICES,
Respondents

ORDER

NOW, April 3, 1992, the preliminary objections of the departments, dated August 23, 1991, are overruled and the respondents shall answer the petition for review.

/s/ David W. Craig
DAVID W. CRAIG
President Judge

APPENDIX C

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 80 M.D. Appeal Docket 1992

RICHARD OLON and JENNIFER OLON, a/k/a
MARY JENNIFER OLON, his wife,
Appellees

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF CORRECTIONS and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF GENERAL SERVICES,
Appellants

Application for Reargument of the Order and Judgement entered by the Supreme Court on June 1, 1993

ORDER

PER CURIAM

And now, this 8th day of July, 1993, it is hereby ordered that the application for reargument is denied.

Mr. Justice Larsen dissents and would grant reargument.

APPENDIX D

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 80 M.D. Appeal Docket 1992

RICHARD OLON and JENNIFER OLON, a/k/a
MARY JENNIFER OLON,
Appellees

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF CORRECTIONS and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF GENERAL SERVICES,
Appellants

APPLICATION FOR REARGUMENT OF THE ORDER AND JUDGMENT ENTERED BY THE SUPREME COURT ON JUNE 1, 1993

Appeal From The Order Of The
Commonwealth Court, No. 215 M.D. 1991,
Dated May 14, 1992

* * * *

APPLICATION FOR REARGUMENT

I. PRELIMINARY STATEMENT

Appellees, Richard Olon and Jennifer Olon, a/k/a Mary Jennifer Olon, his wife, respectfully request that this Honorable Court grant reargument of the Order and Judgment entered in this matter on June 1, 1993 (copy attached as Appendix A). This Honorable Court's Order of June 1, 1993 reversed the Order of the Commonwealth Court dated May 14, 1992, at No. 215 M.D. 1991. (R.53a-59a).

Oral Argument was held before this Honorable Court on May 4, 1993, resulting in the filing of an Opinion and Order on June 1, 1993. The Honorable Justice Rolf Larsen dissented from the Opinion and Order.

II. MISAPPREHENDED OR OVERLOOKED LAW OR FACTS

This Honorable Court's Opinion and Order of June 1, 1993, is inherently inconsistent with this Honorable Court's decision in *County of Venango vs. Borough of Sugarcreek, Zoning Hearing Board, Appeal of Kresenske, et al*, —— Pa. ——, —— A.2d —— (1993), which was decided May 26, 1993. In fact, this Court did not discuss the implications of the decision rendered by the Court in *County of Venango*, supra.

* * * *

III. STATEMENT OF REASONS

A. THE DECISION OF THIS HONORABLE COURT IS INCONSISTENT WITH THE RECENTLY DECIDED CASE OF *COUNTY OF VENANGO VS. BOROUGH OF SUGARCREEK, ZONING HEARING BOARD, APPEAL OF KRESENSKE, ET AL.*, —— Pa. ——, —— A.2d —— (1993).

On May 26, 1993, this Honorable Court decided the case of *County of Venango vs. Borough of Sugarcreek, Zoning Hearing Board, Appeal of Kresenske, et al.*, —— Pa. ——, —— A.2d —— (1993) (Appendix B). In *County of Venango*, the issue presented was whether the powers of Venango County under the County Code are preeminent over the zoning ordinance adopted by Sugarcreek Borough under the authority of the Municipalities Planning Code (53 P.S. § 10601, et seq.). *County of Venango*, supra. *Slip Op.* at p. 1. In reviewing the relevant provisions and application of the County Code (16 P.S. § 2305 and § 2315), this Honorable Court stated:

> [W]e do not agree that these sections of the County Code established a clear legislative direction that the authority granted therein to use county property for a jail may be exercised without regard to local land use restrictions. Even if the commissioners may "act within the sphere of their legal authority" to acquire property or use property already owned by the county for the stated purposes, there is no indication that they may ignore local zoning restrictions in doing so. These sections are no more specific with regard to the zoning issue than the provisions authorizing acquisitions by eminent domain that we stated in *Ogontz* do not in and of themselves indicate a legislative intent to preempt local regulation. *Slip Op.* at 5-6.

In this case, there is no distinction between the authorization included in Act 223 of 1990 and the provisions

contained in the County Code, 16 P.S. § 2305 and § 2315. In both cases, the legislation specifies the property to be acquired and the specific use or purpose for the acquisition of the property. Thus, while this Honorable Court discussed the application of *Department of General Services vs. Ogontz*, 505 Pa. 614, 483 A.2d 448 (1984) in *County of Venango*, supra, and this case, this Court did not discuss the proper application of *County of Venango*, supra, to this case.

Additionally, the inconsistencies of these decisions, and the sustaining of the Departments' Preliminary Objections herein, violate the Appellees' rights to Due Process and Equal Protection pursuant to the Constitution of the United States, Amendment 14, Section 1, and also the Constitution of the Commonwealth of Pennsylvania, Article 1, Section 1.

* * * *

IV. *CONCLUSION*

Wherefore, for the foregoing reasons, this Honorable Court should grant Appellees' Application for Reargument.

Respectfully submitted,

SHAFER, SWICK, BAILEY,
IRWIN & STACK

By: /s/ James R. Irwin
JAMES R. IRWIN

By: /s/ Jeffrey K. Millin
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[Appendix A and Appendix B Omitted in Printing]

APPENDIX E

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 6 W.D. Appeal Docket 1992

COUNTY OF VENANGO,

v.

BOROUGH OF SUGARCREEK, ZONING HEARING BOARD

APPEAL OF: JUDY KRESENSKE, NOLA L. BARNES, JAMES HOLDEN, CARYL HOLDEN, DANIEL BRENNEMAN, BEVERLY A. BRENNEMAN, LOWELL J. THOMAS, BEVERLY THOMAS, ROBERT ADAMS, HOWARD BARGER, SHIRLEY BARGER, ADA AUDINE WILT DEETER, ROBERT T. BELL, R. THOMAS BELL, JOHN E. CUTCHALL, GLENN FULMER, LOUIS DALMASO, LOUISE DALMASO, MARK DALEY, KATHRYN DALEY, FRANCES PAYNE, LARRY GREEN, MARY BLACK, DALE W. GREEN, MICHAEL SHOOK, CYNTHIA SHOOK, WILLIAM VALLESALICE, HAROLD MOORE and FRANCIE E. GIBBONS

Appeal from the Order of the Commonwealth Court
dated July 29, 1991, at No. 2037 C.D. 1990,
affirming the Order of the Court of Common Pleas
of Venango County, Civil Division,
dated September 17, 1990, at A.D. No. 394-1990

141 Pa. Commw. 466, 596 A.2d 265 (1991)

OPINION

SUBMITTED: September 21, 1992

JUSTICE ZAPPALA DECIDED: MAY 26, 1993

This appeal presents a single issue: whether the powers of Venango County under the County Code, Act of August 9, 1955, P.L. 323, as amended, 16 P.S. §§ 2305, 2315, are pre-eminent over the Zoning Ordinance adopted by Sugarcreek Borough under the authority of Municipalities Planning Code, Act of July 31, 1968, P.L. 805, as amended, 53 P.S. § 10601.

The County owns approximately 335 acres of land in the Borough, on which it wishes to construct a new jail. The parcel is located in an area zoned R-1 Suburban Residential, which does not permit the proposed use. The County applied to the Zoning Hearing Board for a special exception, which was denied. The Board determined that a jail was not one of the uses mentioned in the Special Use provisions of the ordinance regarding R-1 zones, and that the use would not be compatible with adjacent uses and structures. Therefore neither basis for granting a special exception existed.

The County's appeal to the Court of Common Pleas was sustained. The court held as follows:

> Under the authority of *Commonwealth of Pennsylvania, Department of General Services v. Ogontz Area Neighbors Association*, 483 A.2d 448 (1984), we must apply a two-step review to determine which municipal government has preeminent power over the other. The first step is to look at the enabling legislation of both municipal bodies to find a clear legislative intent as to which should have preeminent power in case of a conflict. If such intent is found to exist, it would be given effect. If there is no clear legislative intent found within the enabling stat-

utes, the Court then applies the Rules of Statutory Construction. Set out at 1 Pa.C.S.A. § 1921.

We find such clear legislative intent establishing the preeminent power of the County of Venango in the County Code, Act of August 9, 1955, P.L. 323 (16 P.S. Sections 2305 and 2315.) It is thus not necessary to give consideration to the second step of applying the Rules of Statutory Construction. See also *Borough of Tunkhannock vs. County of Wyoming*, 96 Pa. Commonwealth Court, 243, 507 A.2d 438 (1986).

The Appellants here, residents of the area around the parcel who had intervened in the common pleas court, appealed to the Commonwealth Court. That court identified its decision in *Tunkhannock* as an application of the *Ogontz* test that controlled this case and affirmed. We granted allowance of appeal and now reverse.

In *Commonwealth of Pennsylvania Department of General Services v. Ogontz Area Neighbors Association*, 505 Pa. 614, 483 A.2d 448 (1984), we addressed the question whether one instrumentality of the state, the Department of General Services, had authority that overrode the authority of another instrumentality of the state, the City of Philadelphia. The Department sought to construct a facility for the mentally handicapped on property that had been acquired by the Department of Public Welfare pursuant to a legislative mandate to relocate former patients of the Pennhurst State School and Hospital. The City, through its Department of Licenses and Inspections, denied the necessary permits because the proposed use was not permitted in the district, and the Zoning Board of Adjustment affirmed.

The common pleas court reversed, holding that because the Commonwealth had power to acquire property by eminent domain to establish facilities such as the one proposed it was immune from local land use restrictions.

Commonwealth Court affirmed by an equally divided court.

In reversing, we observed

> the conflict . . . is not a contest between superior and inferior governmental entities, but instead a contest between two instrumentalities of the state. [City of Pittsburgh v. Commonwealth, 468 Pa. 174, 179, 360 A.2d 607, 610 (1976)]. The legislature has the power to regulate both of these governmental entities, enlarging or restricting their authority to act; and, generally, the task of courts in these cases is to determine, through an examination of the enabling statutes applicable to each of the governmental entities, which the legislature intended to have preeminent powers. The problem, essentially, is one of statutory interpretation.

505 Pa. at 622-23, 483 A.2d at 452. After reviewing some of the cases, we determined that "this Court's earlier view that eminent domain powers necessarily indicate a legislative intent that the agency may override local zoning regulations, should no longer control." *Id.* at 626, 483 A.2d at 454. Being unable to ascertain the legislative intent from the language of the enabling legislation, we turned to the Rules of Statutory Construction, specifically, the rule that legislative intent may be determined by consideration of the consequences of a particular interpretation. 1 Pa.C.S. § 1921(c)(6).

> The consequences of deciding that the Commonwealth should be preeminent in this matter are that Philadelphia's zoning scheme would be frustrated in this case and every other case where a Commonwealth land use plan conflicted with the city plan. On the other hand, if the city were to prevail, the Commonwealth's mandate to establish mental health facilities at various locations in the state would not necessarily be frustrated, for the loss of one location might well

> be compensated for by substitution of another. Thus, deciding that the city's zoning authority supersedes that of the Commonwealth agency to establish a mental health facility in a particular geographical location arguably would give effect to the legislative mandates of both governmental entities, a consequence which, absent more certain legislative direction, seems advisable.

505 Pa. at 628, 483 A.2d at 455.

Here, the lower courts found a clear indication of legislative intent that the County's authority was preeminent in the County Code, 16 P.S. §§ 2305 and 2315. Section 2305 reads:

> (a) The county commissioners may purchase for not more than the fair market value, take by gift, devise or by the power of eminent domain, in accordance with the provisions of this act, such real property at the county seat or in such other places, as may be authorized by law, as they deem necessary for the purposes of a . . . county jail, prison, . . . or other county building, . . . either in acquisition of a building suitable for such purposes, or in the construction of a new building, or in the alteration, including enlargement, of an existing county building . . . .
>
> (b) The county commissioners may also use any real property at the county seat or elsewhere, as authorized by law, owned by the county, and deemed suitable by them for the purposes aforesaid, except such property as is bound by contract to another public use.

Section 2315 provides:

> (b) The county commissioners may provide . . . for the construction or alteration, including enlargement of a . . . county jail, prison, . . . and such other county buildings, as may be required or authorized

> by law. Such construction or alteration shall be done at the county seat or elsewhere as authorized by law.

Commonwealth Court interpreted the phrase "as authorized by law" in these sections to mean "action by the commissioners within the sphere of their legal authority." This interpretation was derived from *McFarland v. Parkhouse*, 85 Pa. Commw. 467, 482 A.2d 1177 (1984). In that case, township supervisors sought to enjoin the construction of a new county jail on land located within their township. They argued that this language meant that the County Code did not permit such construction outside the county seat *absent specific authorization by the legislature*. Commonwealth Court rejected this interpretation in favor of the one stated above because to interpret "as authorized by law" as requiring a specific statute passed by the legislature to validate the commissioners' action 'would prove a great impediment to a flexible government, responsive to changing conditions and needs.'" *Id.* at 472, 482 A.2d at 1180 (citation omitted). "Absent specific state legislation, legal authority may be established by relevant *county* action, which is what occurred here." *Id.* (Emphasis in original.)

Whatever the validity of this interpretation of the phrase "as authorized by law" in the context of the *McFarland* case, which predated *Ogontz*, we do not agree that these sections of the County Code establish a clear legislative direction that the authority granted therein to use county property for a jail may be exercised without regard to local land use regulations. Even if the commissioners may "act within the sphere of their legal authority" to acquire property or use property already owned by the county for the stated purposes, there is no indication that they may ignore local zoning restrictions in doing so. These sections are no more specific with regard to the zoning issue than the provisions authorizing

acquisitions by eminent domain that we stated in *Ogontz* do not in and of themselves indicate a legislative intent to preempt local regulation.

From this conclusion, the remainder of our analysis is identical to that found in *Ogontz*. The consequences of deciding that the County should be preeminent in this matter are that the Borough's zoning scheme would be frustrated in this case and in every other case where a County land use plan conflicted with the Borough plan and the County was carrying out it one of its enumerated powers "as authorized by law." On the other hand, if the Borough were to prevail, the County's power to locate jails and other facilities would not necessarily be frustrated, for it is possible to exercise this power consistent with local comprehensive land use plans by acquisition of other parcels zoned to accommodate such uses. Such a decision "would give effect to the legislative mandates of both governmental entities, a consequence which, absent more certain legislative direction, seems advisable." *Ogontz*, 505 Pa. at 628, 483 A.2d at 455.

The Order of the Commonwealth Court is reversed. The Order of the Court of Common Pleas of Venango County sustaining the County's appeal from the decision of the Sugarcreek Borough Zoning Hearing Board and granting leave to the County to proceed with plans for construction of a jail on the parcel in question is vacated.

Mr. Justice Larsen files a concurring opinion.

CONCURRING OPINION

JUSTICE ROLF LARSEN

I concur in the result only and in support thereof cite my dissenting opinion in *Olon v. Commonwealth of Pennsylvania. Department of Corrections*, —— Pa. ——, —— A.2d —— (1993).

APPENDIX F

STATUTORY PROVISIONS INVOLVED

1. Section 3(1)(ii)(A) of the Capital Budget Project Itemization Act for 1990-91, 1990 Pa. Laws Act No. 1990-223, P.L. 1472, provided as follows:

> Section 3. Itemization of public improvement projects.
>
> Additional capital projects in the category of public improvement projects to be constructed or acquired by the Department of General Services, its successors or assigns, and to be financed by the incurring of debt, are hereby itemized together with their respective estimated financial costs, as follows:
>
> * * * *
>
> (1) Department of Corrections
>
> * * * *
>
> (ii) State Correctional Institution—Crawford County
>
> (A) Acquisition and renovation of former Polish National Alliance College for use as a State Correctional Institution $8,876,000
>
> (Base Project Allocation—$4,608,000)
>
> (Land Allocation—$3,000,000)
>
> (Design and Contingencies—$1,268,000)

2. Section 7 of An act * * * providing for Department of Corrections capital projetcs * * *, 1992 Pa. Legis. Serv. Act No. 1992-180 (Purdon), provided as follows:

Section 7. Section 2401.1a of the act, added July 1, 1990 (P.L. 277, No. 67), is amended to read:

Section 2401.1a. Restrictions on Powers of the Department of General Services [71 P.S. § 631.1a]

(a) * * *.

(b) Capital projects in the category of public improvement projects specifically itemized for the Department of Corrections in section 3(1) of the act of December 20, 1990 (P.L. 1472, No. 223) known as the "Capital Budget Project Itemization Act for 1990-1991," are hereby authorized to be acquired, constructed or used by the Department of General Services, its successor or assigns, notwithstanding any provision of law providing for or regulating zoning or land use planning, or any zoning ordinance, land use ordinance, building code or other regulation adopted or enacted by a political subdivision under the authority of any statute, or under the authority of any home rule charter authorized and adopted under any statute or the Constitution of Pennsylvania.

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. A-282

RICHARD OLON, ET UX., ETC.,
Petitioners

v.

PENNSYLVANIA DEPARTMENT OF CORRECTIONS, *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including November 5, 1993.

/s/ David H. Souter
Associate Justice of the
Supreme Court of the
United States

Dated this 28th day of September, 1993.